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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/15/09

SPONSOR Lopez LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE County Detention Facility Population Control SB 437

ANALYST Weber

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate but Substantial	Indeterminate but Substantial	Indeterminate but Substantial	Recurring	General

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Bernalillo County Metro Court (BCMC)  
 Administrative Office of the District Attorney (AODA)  
 Attorney General (AOG)  
 Public Defender Department (PDD)  
 New Mexico Corrections Department (NMCD)

#### No Response From

New Mexico Association of Counties

### SUMMARY

#### Synopsis of Bill

Senate Bill 437 enacts the “County Detention Facility Population Control Act.”

Section 2 provides definitions:

- “commission” means the county detention facility population control commission;
- “jail administrator” means the person hired by a county who supervises the operation of the jail;
- “nonviolent offender” means:
  - a person charged or convicted of a nonviolent offense, as that term is defined in Section 33-2-34 NMSA 1978; or
  - a person incarcerated for violating the conditions of probation or parole due to the use or possession of a controlled substance and whose original conviction was for the commission of a nonviolent offense;

- “operational capacity means the number of inmates that can be accommodated in the detention facility based on bed space, staffing, and services.

Section 3 indicates that the board of county commissioners shall establish, annually, by resolution, the operational capacity for each county detention facility.

Section 4 empowers the board of county commissioners to create a “county detention facility population control commission,” which can convene quarterly to review alternative incarceration programs and other population control mechanisms. The commission would be composed of five members, as follows:

1. the jail administrator, who would serve as chair of the commission;
2. two public officials or private citizen appointed by the board of county commissioners;
3. a public official or private citizen appointed by the chief judge of the district court;
4. a public official or private citizen appointed by the chief judge of the metropolitan or magistrate court.

Members are entitled to compensation pursuant to the provisions of the Per Diem and Mileage Act but none other.

Section 5 delineates the county detention population control measures: (1) When the county detention inmate population exceeds ninety percent of the operational capacity of that facility for ninety consecutive days, the jail administrator shall, among other appropriate efforts, provide notice to the corrections department indicating that it should remove all convicted felons from the county detention facility within thirty days of the notice; (2) If after ninety days the detention facility still exceeds ninety percent of operational capacity, the jail administrator shall provide a list of the detention facility’s nonviolent offender inmates to the following: the commission, the district court, the metropolitan or municipal and magistrate courts, the district attorney, the public defender, the secretary of corrections, and local law enforcement agencies; (3) The commission shall convene with ten days of receipt of the notice to consider the release of the nonviolent offenders, and may provide for their early release with the following exceptions: (a) if it is discovered that the information that classified the offender as nonviolent is materially inaccurate; (b) if the nonviolent offender is convicted of a crime while incarcerated; or (c) the nonviolent offender fails a drug screening test within ten days of the offender’s scheduled release.

The effective date of these provisions would be July 1, 2009.

## **FISCAL IMPLICATIONS**

The NMCD indicates there could be substantial cost as a result of this bill. It is very likely that the Corrections Department will receive a substantial number of felony offenders from county facilities. The NMCD’s prison population will grow and reach its own rated capacity very quickly. The bill contains no appropriation to offset any of the likely significant increases in prison population and associated costs caused by the bill.

The bill does not require the county facility to pay the Department to house these felony offenders, and yet the bill would result in at least two groups of felony offenders (probation violators awaiting a probation revocation hearing, and those individuals with prior felony convictions that are not on probation or parole but who are in jail on a new charge such as public intoxication) being sent to prison. The Department has absolutely no statutory or case law authority to accept or house this category of jail inmate. See Significant Issues section below.

It is not possible to estimate the custody level requirement for these new inmates but if they need to be housed in the private prison facilities the annual cost per inmate is \$27,761 for males and \$31,600 for females.

## **SIGNIFICANT ISSUES**

NMCD continues.

Pursuant to Sections 33-2-19 and 31-20-2 (A) NMSA 1978, the Department simply lacks the statutory authority to remove or house individuals convicted of felonies if the time to be served (after accounting for any pre-sentence credit and any period of confinement being suspended or deferred) is less than one year. Further, if the person convicted of a felony is incarcerated in a county facility for a probation violation, or has been arrested and placed in a county facility on a new criminal charge but not on a parole violation, the Department has no authority to remove that person from the county facility or to house him in a Department prison. Similarly, the Department simply has no authority to incarcerate a person with a prior felony conviction (and not on any probation or parole) who is in a county facility on a new criminal charge such as public intoxication, loitering, etc.

While there is a recent New Mexico Court of Appeals case holding that the Department is generally responsible for paying the counties for any parole violators that they house, that case does not require the Department to remove parole violators from any county facility. Further, that case did not make the Department responsible for paying the counties for housing probation violators, and current law simply does not require the Department to pay the counties for housing alleged probation violators or to itself house alleged probation violators. The Department only becomes responsible for housing those alleged probation violators found by a judge to have violated their probation and thereafter sent to prison for their violations.

To require the Department to remove parole violators, probation violators, etc. from the county facilities would conflict with Section 33-3-3 NMSA 1978, which mandates that the county jails shall be used as the place of detention for of every person charged with or convicted of crimes and committed by lawful order. In essence, the bill would improperly turn the Department prison system into a jail responsible for incarcerating individuals charged with but not convicted of crimes or probation violations--even though the statutory mission of the Department is to incarcerate only those individuals who have been convicted of crimes and originally sent to prison, and only those individuals sent to prison after having been found to have violated their conditions of probation.

In FY08 the counties began receiving approximately 5 million dollars annually to assist them with their incarceration costs of certain felony inmates. The distribution of funds is based on the ratio of the number of the county's eligible offenders to the state's total number of county offenders. Counties that release convicted felons early would see a reduction in their offender counts, which will reduce their reimbursement amounts or allotments in future years.

The AOC contributes information noting the importance of judicial input on such matters as releasing inmates.

The magistrate and metropolitan courts have limited jurisdiction and can only sentence offenders to a maximum of one year. Many offenses within the court's jurisdiction carry a maximum period of incarceration of 180 days or 90 days. When misdemeanor offenders are actually incarcerated, which is determined by the judge at the time of sentencing, or upon revocation of a suspended sentence when the offender fails to meet conditions of the suspended sentence, the judge also makes a determination whether the offender should be eligible to earn "good time." Section 33-3-9 NMSA 1978 defines a process that allows the county sheriff or jail administrator to reduce the term of an inmate's sentence for "good behavior and industry," by the award of "good time," but that award can only be made with the approval of the committing or presiding judge. SB 437 does not address Section 33-3-9, but in creating a new mechanism by which offenders can be released from jail, without the committing judge's approval, it may stand in conflict to existing statute.

Sentencing is an individual determination made by a judge based on assessment of the individual facts and circumstances presented to the court. As recognized by the New Mexico Supreme Court, "there has never been any doubt about the authority of a judge to exercise discretion in imposing a sentence within a statutory range." State v. Lopez 138 N.M. 521, 542 (2005), citing United States v Booker 125 S.Ct. 738, 750 (2005). Particularly when the court's jurisdiction is limited, as it is for offenders who will serve a sentence in a county's detention center, the sentence to incarceration reflects the court's consideration of all the relevant factors. "In imposing a sentence or sentences upon a defendant, the trial judge is invested with discretion as to the length of the sentence, whether the sentence should be suspended or deferred, or made to run concurrently or consecutively within the guidelines imposed by the Legislature." State v. Duran, 126 N.M. 60, 69 (Ct. App. 1998).

Adoption of SB 437 would mean that, at the time of sentencing, the judge will have no input on the offender's ability to be released from the detention center early, without serving the full sentence imposed.

The BCMC offers additional information.

The language of the bill is vague in empowering jail administrator or sheriff to "engage in all lawful and professionally appropriate efforts to reduce the inmate population." Bernalillo County has previously indicated its belief that a county has the statutory authority to release an inmate from incarceration into a community custody program ("CCP") without judicial authority - an interpretation of statute that is vehemently contested by the Bernalillo County Metropolitan Court. The Metropolitan Court is therefore concerned that the county would cite such vague language in the Act to support its position. Accordingly, at the very least, the bill requires clarification that "engag[ing] in all lawful and professionally efforts" excludes the release into a CCP or the granting of "good time" credits without judicial approval.

The bill provides for the release of "nonviolent" offenders by a county detention facility population control commission, *without judicial approval*, pursuant to NMSA 1978, Section 33-3-9. However, Section 33-3-9(A) specifically requires the approval of the committing or presiding judge prior to any deduction of any time from an inmate's sentence. Thus, the bill is in direct conflict with the language of the existing statute.

The bill also provides that the chief judge of the district court and the chief judge of the metropolitan or magistrate court, as applicable, each name a public official or private citizen to serve on the county detention facility population control commission. As such, judicial designees with no jurisdiction may be asked to set aside valid and appropriate sentences of sentencing judges, in violation of New Mexico law. The Metropolitan Court also believes that, as it would be a violation of the Rule 21-500 Code of Judicial Conduct for a judge to serve on the county detention facility population control commission, it would similarly be a violation for a judge to designate an individual to serve on the commission.

The BCMC continues that there appears to be no provision in the bill for constitutionally mandated notice and "input" from victims of certain crimes. By utilizing the definitions in NMSA 1978, Section 33-2-34 (L), SB 437 provides that, in determining eligibility for good time credit, only offenders who committed *serious violent offenses* are excluded -- that means that all other "violent" offenders, under the normal meaning of the word, would be included and subject to release by the commission. The New Mexico Victims of Crime Act, NMSA 1978, Sections 31-26-1 et seq., requires that notice and an opportunity to be heard be provided to victims of virtually all violent crimes – including misdemeanors. It gives victims the right to make a statement at any post-sentencing hearing for an accused; arguably, any hearing by a county commission regarding the release of an inmate into an AIP would implicate the rights of the victim under the Victim of Crimes Act.

Article II, Section 24 of the New Mexico Constitution now mandates victims' rights similar to those of the Victims of Crime Act, including information relating to the sentencing and/or imprisonment of the offender, as well as the right to make a statement at any post-sentencing hearing.

## **OTHER SUBSTANTIVE ISSUES**

The NMCD feels this bill would also jeopardize the safety of the inmates sent to Department prisons from county jails because the bill does not require the county facility to provide any medical or other relevant transfer information regarding those inmates. The lack of information means that inmates needing immediate medical or mental health treatment may not get it, and inmates needing to be housed in protective segregation due to enemies, mental retardation, etc. may be inappropriately housed and then harmed by other inmates. Further, dangerous inmates might harm Department prison staff because of no notice being given regarding the dangerousness or propensity for violence of particular inmates sent from the counties to the Department.

The bill's definition of operational capacity is so broad that it would, for example, allow a county to claim that its operational capacity is over 90 percent and to force the Department to take certain inmates even though the county facility is half empty (due to shortages in staff, reduced programming or services, etc.).

MW/svb